

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CILLIA CHANEY,

Plaintiff-Appellee,

v

WILLIAM WHYBARK,

Defendant,

and

CITY OF FLINT,

Defendant-Appellant.

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UNPUBLISHED

September 29, 2005

No. 262526

Genesee Circuit Court

LC No. 03-076997-NI

Before: Saad, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant City of Flint appeals as of right the trial court's order denying its motion for summary disposition in this governmental immunity case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On December 23, 2002, defendant dispatched a road crew to repair a broken water main underneath the pavement in the northbound lanes on Ballenger Highway. The crew drilled several small holes in the pavement to determine the exact location of the break. The crew repaired the water main and patched the road; however, when it attempted to reopen a water valve, the valve broke and began leaking water onto the roadway. Due to the lateness of the hour, the crew did not repair the leak immediately, but barricaded the area and arranged for the road to be salted.

The next day, plaintiff was driving southbound on Ballenger Highway in the area of the main break, and defendant William Whybark was driving northbound in the same area. Whybark's truck hit a patch of ice that had formed in the area of the valve leak, causing him to swerve into the southbound lanes and strike plaintiff's vehicle. Plaintiff filed suit, alleging that Whybark operated his vehicle in a negligent manner and that defendant breached its duty to repair and maintain the street so that it was reasonably safe and convenient for public travel. Specifically, plaintiff alleged that defendant allowed water to leak onto the roadbed thereby

causing flooding and freezing, and that defendant drilled holes in the roadway to encourage water to drain over the roadway.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) and (10), arguing that the highway exception to governmental immunity did not apply because a leaking water valve did not constitute a defect in the highway itself; that even assuming arguendo that the highway was defective, the defect did not proximately cause plaintiff's injuries; and that it did not have reasonable time to repair the defect before the accident occurred. The trial court denied the motion, finding that questions of fact existed as to notice as well as to whether the broken valve constituted a defect in the roadway, and as to proximate cause.<sup>1</sup> The trial court denied defendant's motion for rehearing.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

The governmental immunity act, MCL 691.1401 *et seq.*, provides that a governmental agency is immune from tort liability while engaging in a governmental function unless a specific exception applies. The highway exception to governmental immunity, MCL 691.1402(1), requires a governmental agency to maintain a highway under its jurisdiction in reasonable repair so that it is reasonably safe and convenient for public travel.

A municipality has no duty to repair or maintain and is not liable for injuries arising from "a portion of a county highway outside the improved portion of the highway designed for vehicular travel," unless at least thirty days prior to the injury the municipality knew or should have known of the defect, and the defect was the proximate cause of the injury. MCL 691.1402a(1). The highway exception is narrowly construed. *Hatch v Grand Haven Charter Twp*, 461 Mich 457, 464; 606 NW2d 633 (2000). Thus, narrowly construed, "the phrase 'improved portion' limits the meaning of 'highway' to the physical structure of the highway, and the phrase 'designed for vehicular travel' further limits the meaning to the physical roadbed alone." *Johnson-McIntosh v Detroit*, 266 Mich App 318, 325; \_\_\_ NW2d \_\_\_ (2005), citing *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 176-177; 615 NW2d 702 (2000).

Defendant emphasizes that the highway exception imposes a duty of reasonable repair and maintenance, as opposed to a duty to keep the highway reasonably safe. *Id.* at 160. However, defendant's assertion that a leaking water valve did not constitute a breach of its duty to repair and maintain the roadway because the valve was not part of the actual physical structure of the roadway itself is without merit. Plaintiff did not claim that the mere presence of ice on the surface of the roadway constituted a defect in the roadbed itself. Such a claim would not avoid governmental immunity. MCL 691.1402a(1); *Johnson-McIntosh, supra*. Moreover, plaintiff did not claim only that defendant failed to keep the highway reasonably safe. Rather, she claimed that defendant's failure to repair a defect within the surface of the roadbed, i.e., the broken water valve, resulted in water leaking from within the roadbed and freezing, thereby creating the

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<sup>1</sup> On appeal, defendant does not address the trial court's findings regarding notice and probable cause. Furthermore, plaintiff's claims against Whybark are not at issue in this appeal.

hazard that caused Whybark to lose control of his truck. The trial court correctly concluded that plaintiff pleaded a claim in avoidance of governmental immunity. MCL 691.1402a(1); *Nawrocki, supra*.

Affirmed.

/s/ Henry William Saad  
/s/ Kathleen Jansen  
/s/ Jane E. Markey